STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LEE BRITT,

Defendant-Appellant.

UNPUBLISHED
April 23, 2002

No. 228017
Huron Circuit Court
LC No. 00-004122-FC

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. He was sentenced to twenty-five to forty years for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

I

Defendant first argues that the prosecution failed to present sufficient evidence of malice to support a conviction for second-degree murder. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court will not interfere with the jury's role of determining intent, the weight of evidence, or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as a state of mind consisting of "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. at 464. A defendant's intent or state of mind, like all the elements of a

crime, may be shown by circumstantial evidence. *People v Dumas*, 454 Mich 390, 398; 563 NW2d 31 (1997). Second-degree murder is a general-intent crime to which a defense of voluntary intoxication is not available. *Goecke, supra* at 464; *People v Langworthy*, 416 Mich 630, 651; 331 NW2d 171 (1982).

The evidence established that the victim was shot to death. Although defendant maintained that the gun discharged accidentally when the victim attempted to grab it as defendant was handing it to him, the physical evidence and testimony indicated that the gun was placed barrel first next to the victim's stomach when it discharged. A firearms expert testified that the weapon could not have fired without the trigger being pulled, even if the hammer had fallen accidentally as a result of rough handling. Moreover, testing revealed that the victim did not have visible gunpowder residue on his hands. According to the firearms expert, had the victim placed his hand on the "cylinder" area of the gun where the cartridges were loaded or near defendant's hand on the trigger well of the gun, visibly obvious powder burns would have been present. Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to infer that defendant placed the barrel of the gun on the victim's stomach and pulled the trigger, contradicting defendant's claim that the gun discharged while the victim was grabbing it from him. Thus, sufficient evidence of malice was presented to support defendant's conviction of second-degree murder.

II

Defendant argues that he was denied the effective assistance of counsel due to the admission of certain statements he made to the police.

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that he was prejudiced by the deficiency. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Limiting our review to the existing record, *People v Thew*, 201 Mich App 78, 90; 506 NW2d 547 (1993), it is apparent that a motion to suppress would not have been successful with regard to the statements made by defendant on the evening of the offense while seated in the police vehicle. Even if defendant was in custody for purposes of *Miranda*[1] when he made the statements, *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987); *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999), the evidence does not indicate that the statements resulted from any interrogation by the police. *Rhode Island v Innis*, 446 US 291, 303; 100 S Ct 1682, 1689; 64 L Ed 2d 297 (1980); *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Rather, the record shows that the statements were spontaneously made by defendant. Under these circumstances, *Miranda* warnings were not required, and the statements were not subject to suppression. *People v Fisher*, 166 Mich App 699, 710; 420 NW2d 858 (1988).[2]

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Defendant also argues that these statements should have been suppressed because they were not voluntarily made due to his intoxication. However, the determination of whether a statement was made voluntarily remains an inquiry centering on the conduct of the police. *People v*

(continued…)

Defendant's only claim of error with regard to the later written statement appears to be that the omission of the words "accident" or "accidental" allowed the prosecution to successfully argue that the statement was not supportive of defendant's claim that the shooting was accidental. Viewed as a whole, the written statement, while self-serving, put forth a theory of accident. We find no merit to the suggested claim that a hindsight review of trial counsel's choice of words should cause us to now conclude that defendant was denied the effective assistance of counsel. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

III

Defendant argues that reversal is required because of a number of instances in which either witnesses for the prosecution or the prosecutor himself commented on defendant's initial decision to invoke his right to remain silent. Because defendant did not object to the challenged evidence or the prosecutor's comments at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

While it is generally inappropriate for the prosecution to comment regarding an accused's exercise of the constitutional privilege against self-incrimination, *People v Truong*, 218 Mich App 325, 336; 553 NW2d 692 (1996), evidence of a defendant's silence may be admitted at trial to contradict the defendant's trial testimony that he cooperated with the police. *People v Vanover*, 200 Mich App 498, 503; 505 NW2d 21 (1993). Here, defense counsel, in his opening statements, maintained that defendant "cooperated a hundred percent with the police." Considered in this context, defendant has failed to show that the challenged references amounted to plain error.

Furthermore, it is apparent from the surrounding context that the references to defendant's decision to invoke his right to silence were not injected for an improper purpose, but rather, were intended to refute defendant's assertion of intoxication. Thus, the evidence did not affect defendant's substantial rights. Further, defendant has not established that he was prejudiced by counsel's failure to object to the evidence, where the evidence showed that despite his invocation of his rights, defendant cooperated with police and made voluntary statements.

IV

Defendant next argues that a new trial is required because of instructional error. We disagree.

We review the trial court's jury instructions in their entirety rather than piecemeal to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997); *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457

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Daoud, 462 Mich 621, 635; 614 NW2d 152 (2000). Because defendant has presented no evidence to suggest that the statements were given because of intimidation, coercion or other improper police conduct, rather than as the product of a free and deliberate choice, we find defendant's argument without merit.

(1993). Jury instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

Viewed as a whole, the trial court sufficiently instructed the jury on the element of malice necessary to prove second-degree murder. Although the instructions did not specifically use the terms "willful" and "wanton," the court's instruction on malice sufficiently encompassed the substance of those terms such that defendant's substantial rights were protected.

Defendant also argues that the trial court erred in failing to sua sponte instruct the jury on the limited use of prior bad acts evidence in accordance with CJI2d 4.11. Defendant provides no support for his assertion that a trial court has a duty to sua sponte provide such an instruction. Further, defendant was not prejudiced by the court's failure to instruct the jury in accordance with CJI2d 4.11. The alleged prejudicial "other acts" evidence was that defendant was not supposed to associate with the victim, who was on parole for an act the two had committed together, that defendant had a large gun collection, and that defendant and the victim were riding recreational vehicles while intoxicated earlier in the evening. None of these matters would lead the jury to reject defendant's accident defense if it were otherwise disposed to accept it. Thus, we are not convinced that the court's failure to instruct on CJI2d 4.11 affected defendant's substantial rights. Nor are we persuaded that defense counsel was ineffective for not requesting the cautionary instruction.

V

Finally, defendant asserts that he is entitled to be resentenced because the trial court erroneously scored one hundred points for offense variable three (OV3) of the sentencing guidelines.

We initially note that defendant did not preserve this issue by raising it in an appropriate motion in the trial court. MCL 769.34(10); MCR 6.429(C). However, defendant also argues that his attorney was ineffective for not challenging the scoring of OV3. Accordingly, we will consider the issue in this context. *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

Defendant argues, and plaintiff concedes, that the trial court erroneously scored one hundred points for OV3. The plain language of MCL 777.33 precludes such a score where, as here, the offense being scored is a homicide offense. Thus, we conclude that counsel was ineffective for not objecting to the scoring of OV3. Because the scoring error significantly affects the recommended sentence range, we also conclude that defendant was prejudiced by the error. *Strickland, supra*. We therefore remand for resentencing.

Defendant's convictions are affirmed. Remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald